MBf CAPITAL BHD & ANOR *a*

v.

TOMMY THOMAS & ANOR (NO 10)

HIGH COURT MALAYA, KUALA LUMPUR *b*
RK NATHAN J
[CIVIL SUIT NO: S2-23-52-1996]
19 MAY 1998

CIVIL PROCEDURE: *Amendment - Defence - Discretion of court - Whether raises new defence - Whether delay a bar - Bona fides - Hardship caused to other party - Rules of the High Court 1980, O. 20* *c*

The plaintiffs sued the defendants for damages in defamation relating to the utterance of words by the 1st defendant which the plaintiffs alleged were slanderous and which were later published in an international magazine. The alleged defamatory words were uttered in September 1995 and published in November 1995, and related to the conduct of the plaintiffs and their counsel in relation to the administration of the Malaysian legal system. The 1st defendant was a partner in the 2nd defendant, a firm of advocates and solicitors. *d*

e

The 1st defendant applied to amend his defence under O. 20 of the Rules of the High Court 1980 to include, *inter alia*, the following: (1) the 1st plaintiff was a non-trading corporation and accordingly no damages for libel was recoverable on its behalf; (2) that he was not authorised to speak for the firm or his partners; (3) that he was only answerable for the actual words spoken by him and not for any insinuations arising out of the context in which they appeared in the article; (4) that he had not said that any judge, member of the bar or party to the cases mentioned in the article was guilty of corruption; and (5) had he known the context in which the words spoken by him were to appear in the magazine, he would not have consented to being quoted. *f*

g

The 1st defendant submitted that the amendments should be allowed as they did not add anything new to the earlier defence filed and they arose out of the same or substantially the same facts. In opposing the application, the plaintiffs argued that: (1) the application was made six days before the trial although the trial dates had been fixed many months before; (2) no reason was given for the delay; (3) the amendments were facts within the 1st defendant's knowledge for the past 2½ years; (4) the 1st defendant was an eminent advocate and solicitor who ought to have known to file such an application earlier; (5) the 1st defendant had been advised by a leading Queen's Counsel all along. *h*

i

Held:

[1] The 1st defendant had not given any reason for the delay in filing the application for amendments which related to facts which had been in existence since late 1995 and which were well within his knowledge.

[2] The amendments relating to the denial that the 1st defendant had alleged corruption and that he would not have permitted the writer of the article to quote him had he known the context in which he would be quoted, clearly suggested an attempt to transfer the blame to the writer of the article, and lent credence to the plaintiffs' submission that it was an attempt to set up a new defence.

[3] Whilst delay alone is not a deciding factor, the court must consider other factors such as resulting hardship to the other party and *bona fides*. The court was not satisfied that the application was *bona fide* and in the absence of any explanation for the delay in making the application, the court accepted the plaintiffs' suggestion that it was made to delay the trial.

[4] In this case, although the plea of justification was made early, the attempt to shift the blame to the writer of the article was only made some six days before the trial. The delay in bringing the application and the resulting prejudice to the plaintiffs called for the refusal of the application.

[Application dismissed.]

Cases referred to:

Abdul Johari bin Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 ***(refd)***

Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126 ***(refd)***

Wright Norman & Anor v Overseas-Chinese Banking Corp Ltd [1994] 1 SLR 513 ***(foll)***

Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 CLJ 191 ***(refd)***

Other source referred to:

Libel and Slander, Gatley, 9th edn, para 27.33

For the plaintiffs - Dato' VK Lingam (Dato' V Sivaparanjothi & R Thayalan with him); M/s V Siva & Partners

For the 1st defendant - Raja Aziz Addruse (Darryl Goon & Robyn Choi, also as a partner for the 2nd defendant, with him); M/s Raja Darryl & Loh

For the 2nd defendant - Cecil Abraham (RS Nathan & G Rajasingam with him); M/s Shearn Delamore & Co

For K Anantham, a partner of the 2nd defendant - Pores Royan (Eugene Jayaraj with him); M/s N Navaratnam & Co

Reported by Anne Khoo

JUDGMENT

RK Nathan J:

The Application

This is an application (encl. 111) by the 1st defendant for leave to amend his defence.

The major amendments sought *inter alia* are to include the following:

Para 1

> The 1st Plaintiff is a non-trading corporation and accordingly no damages for libel are recoverable on its behalf.

Para 2.3

> The said Defendant has not at any time been authorised by his partners to speak for them or for the firm. The said defendant said nothing to Samuels which could or should have led him (Samuels) to suppose that he (the said Defendant) was speaking on behalf of the firm.

Para 3.2

> The said Defendant will contend at trial that he is answerable only for the words actually spoken by him and not for any other words in the article or for any insinuations arising out of the context in which the said Defendant's words appear in the article. Without prejudice to the generality of that contention the said defendant denies that in any of his conversations with Samuels he spoke any of the following words or any words to the following effect:
>
> (i) that any of the judges in the Courts of Malaysia has been guilty of corruption in any of the decisions or cases mentioned in the said article;
>
> (ii) that any Member of the Malaysian Bar has been guilty of corruption;
>
> (iii) that any of the parties in any of the cases mentioned in the said article has been guilty of corruption.
>
> To the contrary in none of their conversations did either the said Defendant or the said Samuels mention any of the following words "corruption, dishonesty, fraud or moral turpitude". Samuels gave no intimation to the said Defendant that he was proposing to write an article critical of the Malaysian judiciary.

Para 5

A further telephone conversation between the said Defendant and Samuels took place a few days later when Samuels told the said Defendant that he had spoken to a few other people and further discussion took place. A third and final conversation took place between them towards the end of September 1995.

Para 7.2

If the said Defendant had been made aware by Samuels of the context in which words spoken by him were going to appear in the magazine, he would have declined to give his permission to be quoted or indeed to have any further conversation with Samuels.

Case For The Applicant

Raja Aziz Addruse for the applicant relied on *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 FC wherein Mohamed Azmi FJ said at pp. 214/215:

Under Order 20 of the Rules of the High Court 1980, which is equivalent to Order 28 Rules of Supreme Court, a Judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must of course be exercised judicially (see *Kam Hoy Trading v. Kam Fatt Tin Mine* ([1963] M.L.J. 248). The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is *bona fide*; (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. (See *Mallal's Supreme Court Practice* page 342). If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim.

Learned counsel submitted that the amendments sought did not add anything new to the earlier defence filed. He also relied upon the recent Court of Appeal decision in *Abdul Johari bin Abdul Rahman v. Lim How Chong & Ors* [1997] 1 CLJ 361; [1997] 1 MLJ 629 CA wherein it was held that the courts should lean towards granting applications for amendments even when a new cause of action or line of defence was raised provided that it was based on the same facts or arose out of the same transaction subject to an award of costs to the other party for the injustices caused by the amendments. Finally he referred

me to *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] 1 MLJ 230 wherein the then Supreme Court held that it had power to grant an amendment after the expiry of the limitation period notwithstanding that the effect of the amendment would be to add or substitute a new cause of action, subject to the very important condition, namely that the new cause of action must arise out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed. Since the courts had power to grant an amendment even after the expiry of the limitation period, it was urged upon me to allow this application to amend.

Case For The Respondents

In reply Dato' VK Lingam for the respondents urged me to look at the three most relevant paragraphs, namely, 4, 5, and 6, of the 1st defendant's affidavit (encl. 111A) filed in support of this application.

Para 4 reads:

> I verily believe that the proposed amendments to my Defences are necessary so that all relevant and material issues are properly and fully put before this honourable Court.

Para 5 reads:

> The proposed amendments to my Defences are based on the advice of leading counsel Charles Gray QC after a complete and thorough consideration by him of the same. Charles Gray QC is the leading counsel who has agreed to appear for me in this action and for whom an application for an ad hoc admission to practice as an advocate and solicitor pursuant to section 18 of the Legal Profession Act 1976, has been made. The decision on Charles Gray QC's application for admission as aforesaid has been fixed for 7th May 1998.

Para 6 reads:

> I verily believe that these amendments sought will cause no prejudice whatsoever to either of the Plaintiffs.

Learned counsel pointed out that the application was being made six days before the trial was to commence (I had fixed the trial dates many months ago, to run from 15 May to 20 June 1998). He also indicated that the applicant had given no reason for the delay in filing this application so late in the day. He also urged me to consider the fact that the 1st defendant was no ordinary litigant but an eminent advocate and solicitor from a leading law firm and who ought to have known that such an application ought to have been filed earlier. Referring to his client's affidavit in response (encl. 111B) he pointed out to an exh. GD-1 which was a letter dated 6 June 1996 from the 1st

defendant's local solicitors and addressed to the 1st defendant's London solicitors where reference was made to a conference with the same Charles Gray QC. He argued that this was not a case where a silk was engaged in mid-stream since the same Queen's counsel had been assisting the 1st defendant all along.

Referring to the proposed inclusion in para 3.2 of the defence he pointed out that these facts were within the knowledge of the defendant for the last 2½ years. He argued that by these amendments the 1st defendant is now setting up a new defence, namely that he did not say those words. However, he had not denied the same for the last 2½ years and just before the trial he was attempting to whittle down the impact by saying he didn't say those words. Dato' Lingam submitted that if the inclusion to para 7.2 was in his initial defence, he would have applied to strike it out.

Court's Findings

It is clear from the affidavit of the 1st defendant that he has neither given any reason for the delay in filing this application nor has he given any reason why he had not exercised due diligence in making this application much earlier since I had fixed these trial dates some time in January 1998. It is not difficult to comprehend that these amendments actually relate to certain facts which existed as long ago as in late 1995 and which said facts were well within the knowledge of the 1st defendant. He has not therefore explained to the satisfaction of the court why it only became necessary for him to file this application six days before trial.

Taking each of the major paragraphs sought to be amended it is my judgment that regarding para 1, the inclusion sought was well within the knowledge of the 1st defendant from the outset or at least it ought to have been within his knowledge that the 1st plaintiff is a non-trading corporation. Since the inclusion sought to be made in respect of para 2.3 was within the 1st defendant's own knowledge, he has not explained why he chose not to include this from the outset when he filed his defence. With regard to paras. 3.2, 5 and 7.2 I agree with the submission of the respondents that their inclusion suggests an attempt to transfer the blame to David Samuels. This to my mind clearly lends credence to the respondents' submission of an attempt by the 1st defendant to set up a new defence.

Further since much reliance has been placed on the expertise of Charles Gray QC who it was intended, was to lead the panel of lawyers defending the 1st defendant, yet no explanation has been given why this expert did not see the

need to include all these amendments into the defence at the earlier stage since evidence has been shown that the said Queen's Counsel was already on record as acting for the 1st defendant.

There is merit in the submission of the respondents that even if it appears that the 1st defendant is attempting to pass the blame to David Samuels by these inclusions, the publication in any event does not relieve the liability of the 1st defendant, if liability be so found, although he may have a claim against David Samuels.

Whilst I have no doubt that the law on amendments have been correctly articulated in the cases relied on by the applicant, I must remind myself if the question raised by the then Federal Court in *Yamaha*, has been satisfactorily answered, by the party seeking the amendment, that is whether this application is made *bona fide*. Unfortunately the applicant has not given any reason or explanation for filing this application at this late stage. It is his duty to satisfy me on the *bona fides* of his conduct. Since he is silent, then the respondents' suggestion, that the application is filed to delay the trial as there will have to be consequential amendments all round, if this application is allowed, must be accepted.

I am highly persuaded by a passage from Gatley on *Libel and Slander*, 9th edn, para 27.33 which reads:

> Although normally leave to amend is freely given if justice requires it and there is no element of surprise or prejudice which cannot be compensated by an appropriate order as to costs or otherwise, the court has shown itself reluctant to grant a defendant leave to amend his defence **where the application is made late in the day, either at, or close to, the trial**; in particular, when he seeks to introduce a plea of justification at a late stage, the defendant's conduct will be closely inquired into, and the court will expect him to have shown due diligence in making his inquiries and investigations. It has been held that where delay has been due to the defendant's own default in some respect, that circumstances should be taken into consideration by the judge as part of the matters to be weighed in deciding whether or not to allow an amendment. The mere fact that delay may be capable of being compensated in money is not conclusive of the question whether the amendment should or should not be permitted. (Emphasis provided.)

In this case whilst the plea of justification was taken much earlier, the attempt to shift the publication to David Samuels at this stage of the proceedings, that is, six days before trial, calls for this court's reticence in acceding to the respondent's request for amendment. Besides clearly the delay here is due to the 1st defendant's own fault and this factor too has tilted the balance against the 1st defendant. The resulting hardship or prejudice to the plaintiffs due to

the consequential need to take fuller instructions and to amend clearly militate against the grant of an order in terms of this application.

I agree with the Singapore Court of Appeal in *Wright Norman & Anor v. Overseas-Chinese Banking Corp Ltd* [1994] 1 SLR 513 CA wherein it held that delay alone should not be the deciding factor in refusing to allow an application to amend. The court held duty bound to consider other factors such as resulting hardship or prejudice, that the application for amendment was made seven months before the date fixed for trial, that no evidence of bad faith had been shown, that no facts had been pleaded in support of the plea of justification, that the appellants had undertaken not to seek further discovery and that there was no question of limitation applying. Unfortunately the 1st defendant in the case before me would fail the stringent requirements set in *Wright Norman & Anor*.

Having read all the authorities cited by both parties I am constrained to dismissing this application for leave to amend, my tenth judgment in this case, with costs to follow the event.